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In The

Supreme Court Of The United States

OCTOBER TERM, 1987

KATHY DENT, *Individually and on Behalf of* ANDREW DENT, *a Minor, and as Independent Executrix of the Estate of* GENE GILBERT DENT, *Deceased,*
Petitioner,

vs

THE CITY OF DALLAS, TEXAS, FRANK REED, *and* LARRY EDDINGTON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS IN DALLAS

RESPONDENTS' REPLY

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STATEMENT OF THE CASE

Petitioner's statement of the case is essentially correct, but incomplete. Notably absent is a description of the actions of the Dallas Police officer upon which Petitioner bases her entire case.

Officer Reed stopped a vehicle driven by Allen Davis because Davis was a suspected felon. Officer Reed got out of his patrol car and instructed Davis to pull his vehicle on to the side of the road. As Officer Reed returned to the patrol car, Davis sped away. A high speed chase involving additional patrol cars ensued, and Davis ran a stop sign striking the vehicle driven by Petitioner's husband. Petitioner's only claim is that because Officer Reed's vehicle was equipped with a public address system, he should have used it in his attempt to apprehend Davis. From these facts Petitioner alleges that the City of Dallas has an official policy tantamount to negligence.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

THE TRIAL COURT, TEXAS COURT OF APPEALS, AND TEXAS SUPREME COURT CORRECTLY RULED THAT PETITIONERS FAILED TO PROVE A CAUSE OF ACTION UNDER 42 U.S.C. §1983.

This Court has repeatedly held that Plaintiffs who obtain a judgment under traditional tort principles are not normally entitled to a civil rights recovery. *Baker v. McCollan,* 443 U.S. 137; *Martinez v. The State of California,* 444 U.S. 277, 283 (1980), reh. denied 445 U.S. 920; *Hull v. City of Duncanville,* 678 F.2d 582 (5th Circuit, 1982); *Jackson v. City of Joliet,* 715 F.2d 1200 (7th Circuit, 1983), cert. denied 465 U.S. 1049, 104 S.Ct. 1325 (1984). Yet, Petitioner would have this Honorable Court rule that the general policy of the City of Dallas to have police officers arrest and pursue felons is a policy tantamount to negligence, entitling her to a civil rights recovery.

Although there was no evidence to support their finding, the jury found that a police officer was negligent in this case. They also found, reasonably, that the City of Dallas has a policy of arresting and pursuing felons, and that the officer was attempting to carry out those policies. The jury did *not* find that the negligent conduct of the police officer was required by the policy of the City. The jury merely found that the officer was implementing the broad policies of the City by attempting to arrest a suspected felon, and pursuing him when he fled. The fact that the officer may have been negligent on this single occasion does not prove a municipal policy of negligence.

It is well established by this Court that an isolated incident of negligence or excessive force is not sufficient to raise a

cause of action under 42 U.S.C. §1983. *City of Oklahoma City vs. Tuttle,* 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427, reh. denied 473 U.S. 925. In *Tuttle,* this Court clearly identified the pitfalls of asserting that a municipal policy gives rise to a §1983 cause of action:

> ... some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation, some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force. But Monell must be taken to require proof of a City policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was 'caused' by the municipal 'policy.' At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged. *Id.* at 471 U.S. 823, 85 L.Ed2d 804.

This Court's caveat in *Tuttle* to avoid stretching a policy to countenance a remote event is ignored by Petitioner. Petitioner asserts that because the City of Dallas has a policy of arresting and pursuing felons, any negligent conduct by an officer in implementing those procedures is itself a policy of the City.

Petitioner's attempt to base her contentions on the holdings in *Monell* ignores the obvious distinctions between the two cases. As the Court stated in *Tuttle:*

> The "policy" of the New York City Department of Social Services that was challenged in Monell was a policy that by its terms compelled pregnant employees to take mandatory leaves of absence before such leaves

were required for medical reasons; this policy in and of itself violated the constitutional rights of pregnant employees by reason of our decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791, 67 Ohio Ops2d 126 (1974). Obviously, it requires only one application of a policy such as this to satisfy fully Monell's requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy... To establish the constitutional violation in Monell, no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise; ...
Tuttle at 471 U.S. 822, 85 L.Ed.2d 803.

Petitioner has not identified any policy of the City of Dallas which, on its face, is negligent, nor were there jury findings to that effect. In fact, the City of Dallas' pursuit policies were examined in great detail by Petitioner's experts. Although Petitioner criticized some of the wording of the City's policies, she did not question or challenge the basic due care requirement contained in the City's policies. (Statement of Facts pages 357-360, 850). The Center for Police Development at Southern Methodist University conducted a three year study of the City's pursuit activities and noted that there were no serious disabling injuries or deaths resulting therefrom. (Statement of Facts pages 1218-1303). Petitioner has failed to show any pattern of civil rights violations on the part of the City of Dallas Police Department. To the contrary, the City of Dallas' safety figures were superior to any of the national statistics presented by the Petitioner. (Statement of Facts pages 651-655)

Also mitigating against Petitioner's assertion of a civil rights cause of action is the jury's answer to Special Issue

Number 8. The jury did not find negligence in the training of the police officers, and Petitioner failed to obtain any findings suggesting that improper or insufficient training had a causal relationship to a deprivation of constitutional rights, as is required by current law. *Rizzo v. Goode,* 423 U.S. 362, 370 (1976); *Hays v. Jefferson County,* 668 F.2d 869, 872 (6th Circuit, 1982), cert. denied 459 U.S. 833; *Merchant v. City of Little Rock,* 741 F.2d 201, 205 (8th Circuit, 1984).

This Court has recently considered the question of determining when tortious conduct by state officials rises to the level of a constitutional tort:

> . . . lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law . . . Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society . . . Where a government official's act causing injury to life, liberty or property is merely negligent, no procedure for compensation is constitutionally required. . .
> *Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662 (1986).

Petitioner alleges that the principles espoused in *Daniels* are inapplicable to the instant case. However, Petitioner fails to consider the last sentence quoted above which obviously addresses the situation involved here.

Petitioner's reliance on *Pembauer v. Cincinnati,* 475 U.S. __, 89 L.Ed.2d 452 (1986), "and not Daniels" is perplexing because the two cases are consistent in holding that there is

a distinction between policies of a municipality and merely negligent acts of municipal employees who are attempting to carry out those policies. *Pembauer* is also consistent with the holding in *Tuttle:*

> The conclusion that tortious conduct, to be the basis for municipal liability under §1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. [footnote omitted] Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"-that is, acts which the municipality has officially sanctioned or ordered.
> *Pembauer* at 89 L.Ed.2d 463.

Even assuming that Officer Reed was negligent, Petitioner has failed to prove that the City of Dallas has an unconstitutional policy regarding the arrest and pursuit of suspected felons.

CONCLUSION

Clearly, the District Court, the Texas Court of Appeals, and the Supreme Court of Texas correctly followed the principles espoused by this Court, and correctly held that the facts alleged by Petitioner do not support a cause of action under 42 U.S.C. §1983.

Respectfully submitted,

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